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Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 122.

DANIEL H. CARSTAIRS ET AL., PLAINTIFFS IN ERROR,

vs.

WILLIE B. COCHRAN, TREASURER, &c.

BRIEF FOR PLAINTIFFS IN ERROR IN OPPOSITION TO MOTION TO DISMISS.

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ANSWER TO THE BRIEF OF DEFENDANT IN ERROR ON MOTION TO DISMISS THE WRIT OF ERROR.

The defendant in error has raised in his brief a question concerning the jurisdiction of this court, alleging that the record does not disclose that a Federal question was involved in the trial in the State court and was decided adversely to the plaintiffs in error (p. 2); and in support of this position he asserts that the opinion of the court of appeals printed in the record does not contain a reference to any Federal question (p. 4).

Surely, when the State court of last resort has determined that a tax law is a valid enactment, and so decides adversely to the plaintiff in error, it cannot be successfully contended that because the State court saw fit in its opinion to ignore a distinct claim that the statute violated the Federal Constitution the writ of error must be dismissed. If

such a contention were sound, the Constitution of the United States would afford but feeble protection against legislation of the States in direct violation of its terms in many cases.

Chapman *vs.* Goodnow, 123 U. S., at p. 548.

That the point was distinctly made both in the trial court and in the court of appeals that the act under which this tax law was sought to be recovered is repugnant to the fourteenth amendment, and is not left to the slightest doubt.

It is distinctly asserted in the defendants' (plaintiffs' in error) second prayer (Record, p. 23), independent of any reference to the other prayers, that the attempt to make the defendants pay the taxes on spirits belonging to persons other than the defendants (plaintiffs in error) is

"contrary to the law of the land, and a *taking of property of* "*the defendants without due process of law,*"

using the very language of the fourteenth amendment.

And in the brief of the appellants (plaintiffs in error) filed in the court of appeals, printed in the report of this case in 95th Md., p. 491, Carstairs *vs.* Cochran, it is asserted that the act is—

"* * * Opposed to * * * the 14th amendment, "sec. 1, of the Constitution of the United States, which guar- "antees that 'no State shall make or enforce any law which "shall abridge the privileges and immunities of citizens of "the United States; nor shall any State deprive any person "of life, liberty or property without due process of law "* * *'"

See N. Y. C. & H. R. R. R. Co. *vs.* New York, 186 U. S., at p. 273 (as to effect of statement in brief).

After this reference to the record, can it be said of this case, in the language of this court quoted from 120 U. S., 103, on page 2 of the Brief of the Defendant in Error, that—

"Certainly it does not appear unmistakably that the "supreme court of the State either *knew or ought to have*

" *known* that the validity of the statute in question was chal-
" lenged on account of its repugnance to the Constitution or
" laws of the United States."

It is not necessary that the Constitution of the United States should be expressly *named* or referred to in the record.

It is sufficient if the record shows that a constitutional question was involved—that the plaintiff in error relied upon a right guaranteed by that instrument.

Wilson *vs.* The Blackbird, &c., 2 Peters, 250, &c.
Satterlee *vs.* Matthewson, 2 Peters, 409–'10.
Beer Co. *vs.* Massachusetts, 97 U. S., 29–30.
Furman *vs.* Nichol, 8 Wall., 56, 57, and 59, and averments of petition, p. 47, bottom.
Crowell *vs.* Randall, 10 Peters, 166 (top), 171 (bottom).
Tregea *vs.* Modesto, &c., 164 U. S., at p. 185.

In each of the cases in 97 U. S. and 8 Wall., *supra*, the allegation in the pleadings was that a State statute impaired a contract, but there was no mention of the Constitution of the United States or any section of it in the record. The subject was thoroughly examined in the case in 10 Peters, and this court there said, page 166, top:

"And here the doctrine of the court has been that it is not
" indispensable that it should appear on the record in *totidem*
" *verbis* or by direct and positive statement, that the question
" was made and the decision given by the court below on
" the very point; but that it is sufficient if it is clear from
" the facts stated, by just and necessary inference, that the
" question was made and that the court below must in order
" to have arrived at the judgment pronounced by it, have
" come to the very decision of that question as indispensable
" to that judgment."

And again, in the case in 8 Wall., *supra*, at page 56 (last half), this court again said :

"It is urged that the particular provision of the Constitu-
"tion which the plaintiffs in error say has been violated in
"its application to this case, should be contained in the
"pleadings; *but this is in no case necessary.*

"If the record shows either by express averment or by
"clear and necessary intendment, that the constitutional
"provision did arise and that the court below could not
"have reached the conclusion and judgment it did reach
"without applying it to the case in hand, then the jurisdic-
"tion of the court attaches."

And in Craig *vs.* State of Missouri, 4 Peters, 410, Chief Justice Marshall said on the same subject :

"* * * it is not necessary to state in terms in the
"record that the Constitution or a treaty or a law of the
"United States has been drawn in question, or the validity
"of a State law on the ground of its repugnance to the Con-
"stitution. It is sufficient if the record shows that the Con-
"stitution or a treaty or law of the United States might have
"been construed, or that the constitutionality of a State law
"must have been questioned, and the decision has been in
"favor of the party claiming under such law."

These citations and references to the record in this case conclusively show that a Federal question was involved, and the decisions of the trial court and the court of appeals upholding the validity of the act of 1892 taxing distilled spirits and entering and affirming the judgment necessarily overruled the objection of the plaintiffs in error that the application of the act to the facts of this case involved a taking of prope rty of the plaintiffs in error against the law of the land and without due process of law. The decisions of the two State courts were findings in favor of the right claimed by the State under the act of 1892, and of necessity against the immunity claimed by the plaintiffs in error.

Bells Gap Rd. Co. *vs.* Pennsylvania, 134 U. S., at p. 236.

It is true that in this case now before the court neither the pleadings nor prayers of the plaintiffs in error made a reference to the fourteenth amendment or any clause of it in *totidem verbis*. But the second prayer distinctly asserted that what the defendant in error was attempting to do was "*contrary to the law of the land and a taking of property of the defendants without due process of law.*"

This was the assertion of an immunity under the fourteenth amendment, and surely it could not be pretended that the learned courts which decided this case at *nisi prius* and on appeal did not know that by so asserting the plaintiffs in error threw themselves for protection upon the fourteenth amendment. The form of the assertion of the immunity as distinctly indicated under what instrument the plaintiffs in error claimed protection as if they had quoted in the prayer the particular clause of it relied upon.

A Federal question was raised when the proposition was asserted that the thing which the defendant in error was attempting to do under the act of 1892, namely, compel the plaintiffs in error to pay taxes on spirits belonging to other persons, was contrary to the law of the land, and without due process of law. Whether the compulsion of the plaintiffs in error, by means of the act of 1892, to make the payment, is due process of law or not, is another question. But if one man cannot be made to pay another's taxes, then a suit to collect the taxes, which is founded upon a statute requiring one person to pay another's taxes, is not due process of law. If the foundation upon which the right asserted by the defendant in error is based is unsound, then, necessarily, the proceedings by which that right is asserted must be unsound.

Missouri Pacific Rwy. Co. *vs.* Nebraska, 164 U. S. 417.

Lewis *vs.* Emigrant, &c., 1 Fed. Rep., 668.

For due process of law refers not merely to regularity of the procedure under a law, but to the law itself as well; no proceedings, however regular in form, under an unconstitutional law, could be regarded as due process of law. Regular proceedings, to constitute due process of law, must necessarily be proceedings founded upon a law which is valid, for an invalid law is no law at all, and proceedings based upon an invalid law would be proceedings without law and therefore without due process of law and contrary to the law of the land.

It is submitted, therefore, not only that the record shows a Federal question to have been involved, but also that it was presented at the proper time and in the proper way.

Respectfully submitted.

W. Cabell Bruce.

D. K. Este Fisher.